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Daewoo Corp v Bauer (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R3-24-36 OF 1998

NIK HASHIM J

26 DECEMBER 1998

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Arbitration — Agreement — Reference of dispute — Incorporation of arbitration clause — Whether distinct and specific words required

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Arbitration — Agreement — Reference of dispute — Notice of arbitration — Disputes arising out of various work orders — Whether separate notice of arbitration should be issued for each work order

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The plaintiff by a written agreement dated 30 May 1994 ('the sub-contract') engaged the defendant as its sub-contractor for certain construction work ('the sub-contract work'). The sub-contract was referred to as work order PRP-A-008. The documents forming part of the sub-contract included the 'Conditions of Building Contract' issued by the Pertubuhan Akitek Malaysia ('PAM conditions'). Clause 34 of the PAM conditions provided for disputes and differences between the parties arising under or in connection with the sub-contract to be referred to arbitration. Apart from work order PRP-A-008, the plaintiff issued 12 other work orders to the defendant requiring them to be executed and completed. Subsequently, disputes and differences between the parties arose relating to the works provided under the 12 work orders. The defendant, purportedly in reliance of cl 34 of the PAM conditions, referred the disputes and differences to arbitration. Subsequently, an arbitrator was appointed. The plaintiff then requested the arbitrator to enquire into his jurisdiction as the plaintiff contended that eight of the 12 work orders did not provide for an arbitration agreement nor was there any incorporation of cl 34 of the PAM conditions.

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The arbitrator ruled, inter alia, that: (i) since he had been lawfully and properly appointed, he had absolute jurisdiction on the arbitration proceedings; and (ii) the eight work orders were merely extensions or variations of the original work order and therefore the conditions of the contract relating to the original work order would also apply to the eight work orders. The plaintiff applied to the High Court for a declaration that the arbitrator had no jurisdiction to arbitrate the disputes and for an injunction restraining the arbitrator from proceeding with the arbitration. The defendant argued that: (i) the eight work orders were variations to the original work order (PRP-A-008) and therefore the arbitration clause (cl 34) applied; and (ii) the incorporation by reference was sufficient to bind the parties to the arbitration clause and accordingly the arbitrator would have the jurisdiction to determine all the work disputes with regard to the eight work orders.

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Held, granting the plaintiff's application:

- (1) The phrase 'the works' in cl 34 must obviously refer to the works to be executed under work order PRP-A-008 (the original work order) and not to the works under the other work orders. The question of incorporation is one of construction of contract. The mere reference to a contract containing an arbitration clause is inadequate to incorporate that clause into another contract. There must be specific reference to the arbitration clause itself. Distinct and specific words are required to incorporate an arbitration clause (see p 30G-H). Moreover, a dispute in relation to contracts without an arbitration clause cannot be referred to arbitration even if those contracts are related to a contract with an arbitration clause (see p 31F).
- (2) Work orders are written contracts, and as such they are to be construed according to their written terms. Each work order being a separate contract, can only be construed relying on the documents forming that specific work order. Any extrinsic evidence, whether oral or documentary, is inadmissible (see p 32A, C).
- (3) Even assuming the eight work orders contained arbitration clauses, the arbitration for each work order should be held separately. There was no provision under the work orders for joint arbitration. There should have been a separate notice of arbitration in respect of each work order. The defendant's notice of arbitration identified only one work order, namely work order PRP-A-008. Therefore, since no notice of arbitration had been issued in respect of the eight work orders, the arbitrator had no jurisdiction to hear the eight work orders as the matter was not properly before him (see p 32D-E).

[Bahasa Malaysia summary]

Melalui satu perjanjian bertulis bertarikh 30 Mei 1994 ('subkontrak tersebut') telah mengambil defendan sebagai sub-kontraktornya bagi kerja pembinaan yang tertentu ('kerja sub-kontrak tersebut'). Sub-kontrak tersebut telah dirujuk sebagai pesanan kerja PRP-A-008. Dokumen-dokumen yang membentuk sebahagian dari sub-kontrak tersebut termasuk 'Conditions of Building Contract' yang dikeluarkan oleh Pertubuhan Akitek Malaysia ('syarat-syarat PAM'). Fasal 34 syarat-syarat PAM tersebut memperuntukkan bagi pertikaian dan perbezaan-perbezaan antara pihak-pihak tersebut yang berbangkit di bawah dan sehubungan dengan sub-kontrak tersebut hendaklah dirujuk kepada timbangtara. Selain daripada pesanan kerja PRP-A-008, plaintif telah mengeluarkan 12 pesanan-pesanan kerja yang lain kepada defendan yang memerlukan dilaksanakan dan disiapkan. Kemudiannya, pertikaian-pertikaian dan perbezaan-perbezaan telah berbangkit antara pihak-pihak tersebut berhubung dengan kerja yang diperuntukkan di bawah 12 pesanan kerja tersebut.

- A** Defendan, yang dikatakan telah bergantung pada fasal 34 syarat-syarat PAM tersebut, telah merujuk pertikaian dan perbezaan tersebut kepada timbangtara. Berikutan itu, seorang penimbangtara telah dilantik. Plaintiff kemudiannya meminta penimbangtara tersebut untuk menyiasat bidang kuasanya kerana plaintiff menegaskan bahawa
- B** lapan dari 12 pesanan kerja tidak memperuntukan bagi perjanjian timbangtara dan tidak juga terdapat sebarang penggabungan akan fasal 34 syarat-syarat PAM tersebut.

- Penimbangtara memutuskan, antara lain, bahawa: (i) oleh kerana beliau telah dilantik secara sah dan dengan sempurna, beliau mempunyai bidang kuasa mutlak ke atas prosiding timbangtara tersebut; dan (ii) kelapan-lapan pesanan kerja tersebut adalah hanya lanjutan-lanjutan dan perubahan-perubahan dari pesanan kerja asal dan dengan itu syarat-syarat kontrak tersebut berkaitan dengan pesanan kerja asal akan juga terpakai kepada pesanan-pesanan kerja yang lapan itu. Plaintiff memohon kepada Mahkamah Tinggi untuk satu pengisytiharan bahawa penimbangtara tidak mempunyai
- C** bidangkuasa untuk menimbangtara pertikaian tersebut dan untuk mendapatkan satu injunksi yang menghalang penimbang tersebut daripada meneruskan timbangtara itu. Defendan telah berhujah bahawa: (i) kelapan-lapan pesanan kerja tersebut adalah perubahan-perubahan kepada pesanan kerja asal (PRP-A-008) dan dengan itu fasal timbangtara (fasal 34) terpakai; dan (ii) penggabungan melalui
- D** rujukan adalah memadai untuk mengikat pihak-pihak tersebut kepada fasal timbangtara tersebut dan sehubungan itu penimbangtara akan mempunyai bidangkuasa untuk menentukan kesemua pertikaian kerja berhubung dengan kelapan-lapan pesanan kerja.
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F **Diputuskan**, membenarkan permohonan plaintiff:

- (1) Ungkapan 'the works' dalam fasal 34 tentunya merujuk kepada kerja-kerja yang hendak dilakukan di bawah pesanan kerja PRP-A-008 (pesanan kerja asal) dan bukannya kepada kerja-kerja di bawah pesanan kerja yang lain. Persoalan penggabungan merupakan pembentukan kontrak. Rujukan semata-mata kepada sesuatu kontrak yang mengandungi fasal timbangtara adalah tidak mencukupi untuk menggabungkan fasal itu ke dalam satu lagi kontrak yang lain. Harulah terdapat rujukan khusus kepada fasal timbangtara itu sendiri. Perkataan-perkataan yang khusus dan berlainan adalah diperlukan untuk menggabungkan sesuatu fasal timbangtara (lihat ms 30G-H). Lagipun, sesuatu pertikaian berhubung kontrak-kontrak tanpa fasal timbangtara tidak boleh dirujuk kepada timbangtara, walaupun jika kontrak-kontrak itu dikaitkan dengan sesuatu kontrak yang mempunyai fasal timbangtara (lihat ms 31F).
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- (2) Pesanan-pesanan kerja merupakan kontrak-kontrak bertulis, dan oleh yang demikian ianya boleh ditafsirkan menurut terma-terma bertulisnya. Setiap pesanan kerja yang merupakan satu kontrak berasingan, hanya boleh ditafsirkan bergantung kepada
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dokumen-dokumen yang membentuk pesanan kerja yang khusus itu. Sebarang keterangan yang ekstrinsik, sama ada secara lisan atau dokumentar tidak boleh diterima (lihat ms 32A, C).

- (3) Walaupun menjangkakan kelapan-lapan pesanan kerja tersebut mengandungi fasal-fasal timbangtara, timbangtara bagi setiap pesanan kerja seharusnya diputuskan secara berasingan. Tidak terdapat peruntukkan di bawah pesanan-pesanan kerja untuk timbangtara bersesama. Seharusnya terdapat satu notis timbangtara yang berasingan berhubung dengan setiap pesanan kerja. Notis timbangtara Defendan hanya mengenal pasti satu pesanan kerja iaitu pesanan kerja PRP-A-008. Dengan itu, oleh kerana tiada notis timbangtara telah dikeluarkan berhubung dengan kelapan-lapan pesanan kerja tersebut, penimbangtara tersebut tidak mempunyai bidang kuasa untuk mendengar kelapan-lapan pesanan kerja tersebut kerana perkara tersebut telah tidak dikemukakan di hadapannya dengan sempurna (lihat ms 32D-E).]

Notes

For cases on reference of dispute in an arbitration case, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 886-889.

Cases referred to

- Alagappa Chettiar v Palanivelpillai & Ors* [1967] 1 MLJ 208 (refd)
Aughton (formerly Aughton Grp) v MF Kent Services (1991) 57 BLR 1 (refd)
Giffen (Electrical Contractors) Ltd v Drake & Scull Engineering Ltd (1933) 37 Const LR 84 (refd)
United Malayan Banking Corp Bhd v Tan Lian Keng & Ors [1990] 1 MLJ 280 (refd)

Legislation referred to

Evidence Act 1950 s 91

MK Chen (Azman Davidson & Co) for the plaintiff.

Tan Swee Im (Porres Royan with her) (David Chong & Co) for the defendant.

Nik Hashim J: This is an appeal by Bauer (M) Sdn Bhd, the defendant against my decision for granting:

- (1) a declaration that the arbitrator, Mr John L Lim, has no jurisdiction to arbitrate the dispute in respect of eight work orders Nos PRP-A-008A, PRP-A-007, PRP-A-011, PRP-A-016, PRP-A-020, PRP-A-033, PRP-A-035 and PRP-A-042; and
- (2) an injunction restraining the defendant and the arbitrator from proceeding further with the arbitration in respect of the above-mentioned work orders,

A with cost to Daewoo Corp, the plaintiff. With regard to prayer (c) which applied for a case to be stated by the arbitrator, I ordered it to be struck out upon the plaintiff's request.

B The plaintiff is the main contractor appointed by Plaza Rakyat Sdn Bhd for the design and construction of Plaza Rakyat at Jalan Pudu, Kuala Lumpur. By an agreement in writing made on 30 May 1994 ('the sub-contract'), the plaintiff engaged the defendant as its sub-contractor for the design, supply and construction of diaphragm wall and ground anchors for the project ('the sub-contract work'). The sub-contract was subsequently referred to as work order PRP-A-008. By art 2 of the form of agreement, the documents forming part of the sub-contract include 'the conditions of building contract' issued by Pertubuhan Akitek Malaysia. For ease of reference, the said conditions are referred to as 'PAM conditions'. Pursuant to cl 34 of the PAM conditions, any dispute and difference between the parties arising under or in connection with the sub-contract shall be referred to arbitration.

C Apart from work order PRP-A-008, the plaintiff issued 12 other work orders to the defendant requiring them to be executed and completed. For the purpose of this application, the relevant work orders are:

- (1) Work order PRP-A-008(A) for diaphragm wall phase 2;
- (2) Work order PRP-A-007 for soil nailing work alongside Jalan Pudu;
- E** (3) Work order PRP-A-011 for Bored Piling at LRT Area;
- (4) Work order PRP-A-016 for soil nailing work at school front;
- (5) Work order PRP-A-020 for micropile installation;
- (6) Work order PRP-A-033 for soil nailing work beneath LRT viaduct;
- (7) Work order PRP-A-035 for cement grouting for MBSS;
- F** (8) Work order PRP-A-042 for Secant Pile work for bus ingress finger.

Disputes and differences between the parties had arisen relating to the works under the abovesaid work orders. By its letter dated 22 April 1997, the defendant purportedly in reliance of cl 34 of the PAM conditions referred the disputes and differences to arbitration.

G Despite plaintiff's previous solicitors, Messrs Sivanathan's letter dated 12 May 1997 to the defendant's solicitors, Messrs David Chong & Co disputing the purported notice of arbitration, the defendant proceeded, vide its letter dated 5 June 1997 to apply to the President of PAM to appoint an arbitrator. Consequently, Mr John L Lim was appointed as the arbitrator.

H The plaintiff vide its letter dated 10 November 1997 made an application to request the arbitrator to enquire into his own jurisdiction. The plaintiff contended that the eight work orders did not provide for an arbitration agreement nor was there any incorporation of cl 34 of the PAM conditions.

I The arbitrator vide his letter dated 21 November 1997 (at p 319 of encl 2) proceeded to make his 'rulings', amongst other things he said:

- (1) First and foremost, it is without any question that in pursuant of cl 34 of the condition of contract between the disputing parties and the provisions of the Arbitration Act 1952 and the PAM Arbitration Rules, I had been lawfully and properly appointed by the Appointing Authority (APM) to conduct the said arbitration and to hear the disputes or differences; hence, I would have absolute jurisdiction on the arbitration proceeding. **A**
- (2) ... **B**
- (3) Having considered both the submissions, I am quite satisfied that the work orders were factually, further extensions (variations) of the original contracted diaphragm wall works in the same project for the disputing parties, and therefore the conditions of contract would be applicable to all works and variations pertaining to the contract; unless and/or until, there are specific agreed alterations in them between the parties. **C**

Hence the application before me.

The defendant contended that the eight work orders were variations to work order PRP-A-008 and thus the arbitration cl 34 applied to them as they were part of the same series as work order PRP-A-008. The defendant also said that the incorporation by reference was sufficient to bind the parties to the arbitration clause and accordingly, the arbitrator would have the jurisdiction to determine all the disputes with regard to the eight work orders. **D**

Having taken into consideration both oral and written submissions from both sides and the various authorities cited by them, I found much merit in the plaintiff's application and I allowed the application. **E**

The PAM conditions in the instant case are standard conditions of building contract which the defendant and the plaintiff chose to use, and as such, they are bound by its provisions. The arbitration clause under cl 34 in work order PRP-A-008 reads as follows: **F**

In the event that any disputes or differences should arise ... either during the progress or after the completion or abandonment of *the works*, as to any matter or thing of whatsoever nature arising thereunder or in connection therewith ..., then such disputes or differences shall be referred to arbitration. (Emphasis added.) **G**

The above provision is clear in its terms in that it has to be read and construed in the context of the work order PRP-A-008. The phrase 'the works' in the clause must obviously refer to the works to be executed under the work order PRP-A-008, and not the works under the other work orders. It is to be noted that the question of incorporation is one of construction of contract (*Giffen (Electrical Contractors) Ltd v Drake & Scull Engineering Ltd* (1993) 37 Const LR 84). But mere reference to a contract containing an arbitration clause is inadequate to incorporate that clause into another contract; there must be specific reference to the arbitration clause itself. Distinct and specific words are required to incorporate an arbitration clause (per Sir John Megaw in *Aughton (formerly Aughton Grp) v MF Kent Services* (1991) 57 BLR 1 (Court of Appeal)). An arbitration agreement is of a special nature and therefore it is not to be lightly inferred. **H**
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- A** In the present case, none of the eight work orders expressly refer to and incorporate the arbitration clause in work order PRP-A-008. Except work orders PRP-A-007 and PRP-A-011, the other six work orders were made only after the termination of work order PRP-A-008 on 22 April 1995 (para 8 at p 205 of encl 2). In the premises, the other six work orders cannot be variations works of work order PRP-A-008, nor can they be in the same series as the work order PRP-A-008 which has already been terminated. Therefore, the terms of work order PRP-A-008, including the arbitration clause therein do not apply to the other six work orders and thus, the arbitrator does not have the jurisdiction to arbitrate the disputes respecting the six work orders.
- B**
- C** Further, the work orders PRP-A-016, PRP-A-020, PRP-A-033 and PRP-A-035 do not state at all that they are part of or in the same series as work order PRP-A-008. Neither do these four work orders state that they incorporate the terms of work order PRP-A-008. Thus, the said work orders are clearly separate contracts from work order PRP-A-008 and they do not contain any arbitration clause. As regard work orders
- D** PRP-A-008A, PRP-A-007, PRP-A-011, PRP-A-042, the general words therein, for example 'Diaphragm Wall phase 2' in PRP-A-008A, '(included in Diaphragm Wall Works)' in PRP-A-007, 'other terms and conditions would be the same as those of Diaphragm Wall and Ground Anchors' in PRP-A-011, and 'This work order is deemed to be part of the earth retention system stipulated under contract PRP-A-008 dated 3 May 1994. Other terms and conditions necessary for the implementation of this work order shall be imported from contract PRP-A-008 provided always that no clause shall override or modify the terms and conditions herein' in PRP-A-042, purporting to incorporate the arbitration clause in work order PRP-A-008, to my mind, is inadequate and ineffective. To be
- E** adequate and effective, the arbitration clause must be expressly referred to. In this case, it was not referred to. Consequently, the disputes in relation to these eight work orders cannot be referred to arbitration.
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- It is trite law that a dispute in relation to contracts without an arbitration clause cannot be referred to arbitration even if those contracts are related to a contract with an arbitration clause. In *Alagappa Chettiar v*
- G** *Palanivelpillai & Ors* [1967] 1 MLJ 208, the claim was in relation to a lease which contained an arbitration clause and a subsequent agreement which did not. The subsequent agreement imposed additional obligations on the defendant in connection with the property which was the subject matter of the lease. In that case, Raja Azlan Shah J (as HRH then was) held that 'as the scope of the arbitration clause extended only to matters under or in connection with the lease and, as the suit involved matters under the subsequent agreement, it would not be reasonable to refer the case to an arbitrator who could only deal with questions arising under the lease and would not be competent to deal with other question arising under the subsequent agreement.'
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- I** As adverted to earlier, the eight other work orders do not contain arbitration clauses. Even if they are related to work order PRP-A-008 which contains such a clause, it is clear that the arbitrator is not competent to deal

with the questions arising out of the other work orders as the scope of the arbitration clause under cl 34 extends only to the works under work order PRP-A-008.

It is worthy to note that the work orders are written contracts, and as such, they are to be construed according to their written terms. The defendant's affidavit however, did not aver that the work orders were not fully made in writing. Neither, is there averment in the affidavit as to the connection between the work order PRP-A-008 and the other work orders, for example whether the other work orders are additional, varied or different works altogether from work order PRP-A-008. Therefore, the defendant's attempt to rely on previous dealings and the relationship between the same parties to incorporate the arbitration clause in the other work orders is clearly unjustified. Each work order being a separate contract, can only be construed relying on the documents forming that specific work order. Any extrinsic evidence, whether oral or documentary, is inadmissible (see s 91 Evidence Act 1950; *United Malayan Banking Corp Bhd v Tan Lian Keng & Ors* [1990] 1 MLJ 280).

Even assuming the eight work orders contain arbitration clauses, the arbitration for each work order should be held separately. There is no provision under the work orders for joint arbitrations. Indeed, there should have been a separate notice of arbitration in respect of each work order. The defendant's notice of arbitration dated 22 April 1997 identified only work order PRP-A-008. Therefore, since no notice of arbitration has been issued in respect of the other work orders, the arbitrator has no jurisdiction to hear the eight work orders as the matter is not properly before him.

Plaintiff's application allowed.

Reported by Andrew Christopher Simon

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